

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts

D.T.E. 97-116

REPLY COMMENTS BY AT&T IN SUPPORT OF THE MOTION OF GLOBAL NAPs TO VACATE ORDERS D.T.E. 97-116-C and D.T.E. 97-116-D

AT&T Communications of New England, Inc., on behalf of itself and its affiliated companies (including Teleport Communications-Boston, Inc., Teleport Communications Group, and ACC National Telecom Corp.) (collectively "AT&T") respectfully urges the Department to allow the motion of Global NAPs, Inc., to reinstate Order D.T.E. 97-116.

The *Opposition* filed by Bell Atlantic-Massachusetts ("BA-MA") on May 5, 2000, does not provide any sound basis for denying the motion to vacate filed by Global NAPs. BA-MA tries to ignore the sum and substance of the recent decision of the United States Court of Appeals for the District of Columbia Circuit, which has made clear that the existing federal statutory framework requires that calls to Internet Service Providers ("ISPs") be treated as local traffic for the purposes of Bell Atlantic's statutory obligation to pay reciprocal compensation. *See Bell Atlantic Telephone Companies v. F.C.C.*, 206 F.3d 1, 2000 WL 273383 (D.C. Cir. 2000). BA-MA also completely ignores its independent contractual obligations to pay reciprocal compensation for ISP-bound traffic, and asks the Department to do the same. AT&T respectfully requests that the Department reject BA-MA's legally unsupportable position, and instead vacate Orders D.T.E. 97-116-C and 97-116-D.

Argument.

I. D.T.E. 97-116-C and D.T.E. 97-116-D Were Premised on an FCC Order That Has Been Vacated, and Thus They Too Should Be Vacated.

Incredibly, BA-MA has framed its opposition to the pending motion to vacate as if the D.C. Circuit had

never ruled, and as if the FCC's ISP Jurisdictional Ruling were still in effect. BA-MA asserts that "[t]he Court did not reverse FCC precedent regarding the proper analysis for determining the jurisdiction of traffic." *BA-MA's Opposition to GNAPs' Motion to Vacate*, at 7. This is wishful thinking, but it is wrong.

The fact is that the D.C. Circuit has ***vacated*** the FCC's ISP Jurisdictional Ruling, and did so in part because the FCC's prior decisions flatly contradicted the outcome in that ruling. Further, as AT&T explained in some detail in its initial comments, the Court's *Bell Atlantic* decision also makes clear that the existing federal statutory framework requires ISP-bound traffic to be treated as local traffic. *See AT&T's Initial Comments* at 5-9.

BA-MA asserts that "the Department has no basis for taking any action in this case to either vacate or reinstate any of its rulings until the FCC provides the further explanation mandated by the Court." *BA-MA's Opposition to GNAPs' Motion to Vacate*, at 5. It asks the Department to do nothing, arguing that "until the FCC further explains its reasoning in the remand proceeding, the Department should not take any action in this case." *Id.* at 6. This suggestion makes no sense. Since the Department's orders D.T.E. 97-116-C and D.T.E. 97-116-D were predicated upon an FCC decision that has been struck down, those orders are now without foundation and they too should be vacated. *AT&T's Initial Comments* at 3-5.

In March of 1999, BA-MA urged the Department to act without delay to vacate D.T.E. 97-116, the original October 1998 ruling in this docket, on the ground that it was no longer valid because it was predicated upon an analysis that had been rejected by the FCC. *See BA-MA's Motion for Modification of Order*, dated March 2, 1999. Despite the fact that the FCC had made clear its intent to address the issue of intercarrier compensation for ISP-bound traffic in future orders, BA-MA urged the Department not to await such further FCC action but instead to move immediately to vacate the Department's prior ruling. *Id.* There is no reason why the Department should not do the same thing at the present time. D.T.E. 97-116-C and D.T.E. 97-116-D were predicated upon an analysis that has been vacated by the D.C. Circuit. Since they can no longer stand, they should be vacated.

II. The Department Should Not Substitute Its Own Policy Prescription for the Parties' Contractual Commitments.

As AT&T emphasized in its Initial Comments filed on May 5, 2000 (at pages 9-12), BA-MA may not escape from its contractual obligation to pay reciprocal compensation for ISP-bound traffic. *See also* D.T.E. 98-57 at 20-23 (March 24, 2000); D.T.E. 97-116-C at 27 n.29 (May 19, 1999). Tellingly, BA-MA ignores this important point.

Nowhere in its Opposition brief does BA-MA make a single reference to the contractual obligations it assumed under its interconnection agreements. Instead, Bell Atlantic urges the Department to permit BA-MA to pay no intercarrier compensation whatsoever for ISP-bound calls, regardless of its contractual obligations to the contrary, on the ground that such a result would comport with "sound regulatory policy." *BA-MA's Opposition to GNAPs' Motion to Vacate*, at 7. BA-MA tries to justify its policy rationale by asserting that, "[s]ince the outset of this case, the Department has proceeded on the basis

that resolving the status of Internet-bound calling rested on the jurisdictional classification of such traffic under applicable FCC precedent." *Id.* at 2. Bell Atlantic suggests that the Department is free in the wake of the D.C. Circuit's ruling to engage in its own jurisdictional analysis, and on that basis to establish a uniform policy permitting BA-MA to send ISP-bound traffic to CLECs for free. *Id.* at 4-6.

BA-MA sang a different song in its Reply Comments dated March 18, 1999, however. At that time, Bell Atlantic correctly noted that "[f]rom the outset, this case has been solely about the interpretation of BA-MA's interconnection agreements and has been limited to a single factual question identified in the *October 21st Order* - where a 'call made by a Bell Atlantic customer to an ISP, but terminated by MCI WorldCom, and then connected by the ISP to the Internet, [was] a 'local call' under the Agreement's definition of local traffic.'" *BA-MA's Reply Comments of 3/18/99* at 2 (quoting D.T.E. 97-116, at 11). At that time, BA-MA emphasized that the Department could not "proceed with a broader examination" of policy considerations and non-contractual intercarrier compensation arrangements for ISP-bound traffic except "by giving adequate notice and providing all parties with an opportunity to be heard on the specific issues that are noticed." *Id.* at 3-4.

Bell Atlantic got it right the first time. The nature of BA-MA's obligation to pay reciprocal compensation for ISP-bound calls is established by its interconnection agreements with various CLECs. The Department has never decided that question. To the contrary, the Department emphasized in its May 1999 ISP Order that it was not resolving the merits of the dispute between Bell Atlantic and MCI WorldCom - never mind the related disputes between Bell Atlantic and virtually every other competitive local exchange carrier with which it had signed an interconnection agreement - regarding the contractual obligation to pay reciprocal compensation on ISP-bound traffic. *D.T.E. 97-116-C* at 25-27 & n.29.

Furthermore, if BA-MA disputes the reciprocal compensation payments that it owes under the interconnection agreements, then it is contractually obligated to follow defined dispute resolution procedures, which include specific procedures for notice and again require negotiation before any relief can be sought from the Department. *See, e.g.,* BA-MA's Interconnection Agreements with AT&T (Section 38.0) and TCG (Section 29.11). Similarly, though BA-MA may be entitled to seek a modification of its interconnection agreements based upon regulatory changes, it is contractually obligated to seek such a modification through negotiation and may not do so by seeking relief directly from the Department. *See, e.g.,* BA-MA's Interconnection Agreements with AT&T (Section 7.8) and with TCG (Section 28.0). In New York, Bell Atlantic has emphasized that under such provisions carriers may not bring disputes regarding reciprocal compensation to a state commission without first engaging in specific, good faith negotiations under their contracts. *See* NY PSC Case 99-C-0529, Letter from Joseph A. Post for Bell Atlantic-New York (dated October 13, 1999) (a copy of this letter by BA-NY is attached hereto). The same is true here.

BA-MA breached its contractual obligations by asking the Department to enter a general order regarding reciprocal compensation for ISP-bound traffic, without first raising the issue through its contractual dispute resolution procedures and attempting in good faith to resolve the issue through negotiations. The Department should vacate D.T.E. 97-116-C and D.T.E. 97-116-D to return the parties to the status quo ante, as it existed before this contractual breach by BA-MA.

Conclusion.

For the reasons stated above and in AT&T's Initial Comments, AT&T respectfully urges the Department to reinstate the October ISP Order, D.T.E. 97-116, and to vacate Orders D.T.E. 97-116-C and 97-116-D.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the above document to be served upon the attorney of record for each other party on May 12, 2000.

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